Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETH HICKS,
Petitioner,

VS.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether claims of racially motivated discharge from employment are actionable under 42 U.S.C. § 1981 after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989)?

2. Whether the Civil Rights Act of 1991, in particular Section 101 of the Act, applies retroactively to cases pending in court on the date of its enactment?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinion Below	1
Jurisdictional Statement	1
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Petition for Certiorari	5
Conclusion	13
Appendix:	
Appendix A — En banc Opinion of the United States Court of Appeals for the Eighth Circuit (December 30, 1992)	A-1

TABLE OF AUTHORITIES

Page(s)

Cases:

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 9

Bradley v. Richmond School Bd., 416 U.S. 696 (1974) 10

Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) 6,8,11

Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) 12

Gersman v. Group Health Ass'n., Inc., 975 F.2d 886 (D.C. Cir. 1992) 10,12

Green v. Bock Laundry Co., 109 S.Ct. 1981 (1989) 9

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1991) 2,5

In re Salem Mortg. Co., 783 F.2d 626 (6th Cir. 1986).. 7

Kaiser v. Aluminum & Chemical Corp. v. Bonjorno, 110 S.Ct. 1570 (1990) 10

Kungys v. U.S., 485 U.S. 759 (1988) 8

Landgraf v. U.S.I. Film Industries, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993) 12,13

McNary v. Haitian Refugee Center, Inc., 111 S.Ct. 889 (1991) 8

Massachusetts Trustees v. United States, 377 U.S. 235 (1965) 11

Mozee v. American Marine Service Co., 963 F.2d 929 (7th Cir. 1992) 12

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 2-5,10

Ralis v. RFE/RL, Inc., 770 F.2d 1121 (D.C. Cir. 1985) 11

Rivera v. Roadway Express, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993) 12,13

Russello v. U.S., 464 U.S. 16 (1983) 7

Taggart v. Jefferson County Child Support Enforcement Unit, 935 F.2d 947 (8th Cir. 1991) 5

U.S. v. Angiulo, 755 F.2d 969 (1st Cir. 1985) 10

U.S. v. Johns, 742 F.Supp. 196 (E.D. Pa. 1990) 11

U.S. v. Nordic Village, Inc., 117 L.Ed.2d 181 (1992) ... 8

Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) 7,8

Statutes:

42 U.S.C. § 1981 ..... *passim*

Civil Rights Act of 1991 ..... *passim*

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OPINION BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on December 30, 1992, is officially reported at 982 F.2d 295 (8th Cir. 1992) (en banc).

JURISDICTIONAL STATEMENT

The Judgment of the Eighth Circuit Court of Appeals, rendered en banc, was entered on December 30, 1992. There was no petition for rehearing filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 101(2)(b) of the Civil Rights Act of 1991 amends 42 U.S.C. §1981 to include the following language:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

See 42 U.S.C. §1981(b).

STATEMENT OF THE CASE

The history of this case, though complex, can be briefly summarized. In 1982, plaintiff Kenneth Hicks, petitioner herein, was terminated from his job by defendant Brown Group, respondent herein. After he was fired, Mr. Hicks, a white male, brought this lawsuit under 42 U.S.C. §1981 alleging that his termination was due in relevant part to his race. In 1988, a jury agreed with him, though it declined to award him any actual damages. Instead, it awarded him $10,000 in punitive damages on the ground that Brown Group's discrimination was willful. The district court modified the actual damages to $1.00, left the award of punitive damages undisturbed, and entered judgment in favor of Mr. Hicks. On appeal, a panel of the Eighth Circuit Court of Appeals affirmed. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990).

Defendant Brown Group then filed a petition for certiorari and the U.S. Supreme Court remanded the case to the Eighth Circuit. 111 S.Ct. 1299 (1991). On remand, the panel reversed the jury verdict in favor of Plaintiff Hicks. In an order dated October 9, 1991, it ruled that Mr. Hicks' claim of discriminatory discharge was not actionable under Section 1981 in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). *See Hicks v. Brown Group, Inc.*, 946 F.2d 1344 (8th Cir. 1991).

Thereafter, on November 21, 1991, President Bush signed into law the Civil Rights Act of 1991. Section 101 of the Act overturns the *Patterson* case and expressly provides that claims of racially motivated discharge from employment are actionable under Section 1981:

> **SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.**
>
> Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended — . . .
>
> (2) by adding at the end the following new subsections:
>
> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

(emphasis added). Plaintiff Hicks' view was that Section 101 of the Civil Rights Act applied retroactively to his case. Accordingly, he filed a motion to vacate the Eighth Circuit's order dismissing his claim under Section 1981. The Eighth Circuit, however, refused to consider the merits of his retroactivity argument, denied his motion to vacate, and suggested that he file a petition for certiorari with the U.S. Supreme Court. 952 F.2d 991 (8th Cir. 1991).

Mr. Hicks sought a writ of certiorari and the U.S. Supreme Court again remanded, this time "for further consideration in light of the Civil Rights Act of 1991." 112 S.Ct. 1255 (1992). On remand, the Eighth Circuit, sitting en banc, ruled that the Civil Rights Act, in particular Section 101 of the Act, does not apply retroactively to cases pending in court at the time of its enactment. Accordingly, it reinstated the panel's order of October 9, 1991 vacating the jury verdict in favor of Plaintiff Hicks. 982

F.2d 295 (8th Cir. 1992) (en banc). Two judges dissented from this ruling, arguing persuasively that (1) claims of racially motivated discharge from employment remain actionable under Section 1981 even after the *Patterson* case and (2) even if they do not remain actionable, Section 101 of the Civil Rights Act applies retroactively to Mr. Hicks' case and validates the jury's verdict in his favor. *Id.* at 299-303.

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER CLAIMS OF RACIALLY MOTIVATED DISCHARGE FROM EMPLOYMENT ARE ACTIONABLE UNDER 42 U.S.C. §1981 AFTER ITS DECISION IN *PATTERSON V. McLEAN CREDIT UNION*, 491 U.S. 164 (1989)

In his dissenting opinion in the court below, Judge Heaney explained why the U.S. Supreme Court should grant certiorari in this case to decide whether claims of racially motivated discharge from employment remain actionable under Section 1981 after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989):

> I recognize that a divided en banc court resolved [this] issue in the negative in *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991). Nonetheless, this issue is raised on appeal and could, and should, be decided differently by this court — if not by this court, then by the United States Supreme Court. I continue to believe that Judge McMillian's eloquent panel opinion in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), is the better view of the law. Judge McMillian again expressed his views on this issue in a dissent to *Taggart*, in which he was joined by former Chief Judge Donald Lay and Chief Judge Richard S. Arnold. The dissent supports the proposition that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), should not bar recovery for employees who have been discharged because of their race. Because the Supreme Court did not specifically address the issue of discriminatory discharge in *Patterson*, it is my hope that it will accept certiorari in this case and resolve the issue once and for all.

Appendix at A8-A9. For the reasons set forth in Judge McMillian's panel opinion, the Court should grant certiorari in this case and hold that claims of racially motivated discharge from employment violate Section 1981.

II. THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO DECIDE WHETHER THE CIVIL RIGHTS ACT OF 1991, IN PARTICULAR SECTION 101 OF THE ACT, APPLIES RETROACTIVELY TO CASES PENDING IN COURT ON THE DATE OF ITS ENACTMENT.

There are three basic reasons why the Court should grant certiorari on this important issue. First, the Eighth Circuit's ruling that the Civil Rights Act of 1991 does not operate retroactively is clearly wrong on the merits. Therefore, it must be corrected by the Court. Second, the Eighth Circuit's ruling conflicts with the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549-1556 (9th Cir. 1992). The Court should grant certiorari in this case to resolve the conflict among the Circuits. Third, the Court has recently granted certiorari in two cases which squarely raise the retroactivity issue. This development shows that the retroactivity of the Civil Rights Act is an important legal issue which warrants review by the Court. Each of these three reasons for granting certiorari will be discussed in turn.

1.

According to the Eighth Circuit, there is no evidence that Congress wanted the Civil Rights Act of 1991 to operate retroactively. Plaintiff Hicks disagrees. The Eighth Circuit failed to discuss, let alone follow, two well-settled rules of statutory interpretation which show that Congress wanted the Civil Rights Act to operate retroactively with two minor exceptions not relevant to the case at bar.

At issue is the meaning of Section 402(a) of the Act. Section 402(a) does not merely provide that the statute will take effect upon enactment. Rather, it provides that "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect on enactment." The statutory phrase "Except as otherwise specifically provided" is highly significant. It can only refer to Section 402(b) and Section 109(c) of the Act since these are the only two sections of the statute which specify when they will take effect. Section 402(b) expressly forbids retroactive application of the statute to the pre-enactment conduct of the employer in the ongoing case of *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989). Similarly, Section 109(c) expressly forbids retroactive application of the statute to the pre-enactment conduct of employers in cases brought under Title VII by American employees working for American companies in foreign countries. These two sections show that Congress knew how, when it wanted to, to provide for prospective-only operation of the statute. Significantly, Congress refused to provide for prospective-only operation of the Act in the remainder of the statute. It is a well-settled rule of statutory interpretation that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. U.S.*, 464 U.S. 16, 23 (1983). By denying retroactivity in the particular circumstances described in Sections 402(b) and 109(c), Congress clearly indicated that the balance of the statute was to be applied retroactively. *See, e.g., In re Salem Mortg. Co.*, 783 F.2d 626, 631 n. 14 (6th Cir. 1986). There is no escape from the conclusion that Congress wanted the Civil Rights Act to operate retroactively except as otherwise specifically provided in Section 402(b) and Section 109(c).

There is a second well-settled rule of statutory interpretation which illuminates the intent of Congress. As this Court has recently reaffirmed, a court must construe a statute so that no part

of it is rendered insignificant or inoperative, redundant or superfluous. *U.S. v. Nordic Village, Inc.*, 117 L.Ed.2d 181, 189 (1992). Some purpose must be ascribed to Section 402(b) and Section 109(c). The Eighth Circuit's reading of the statute, however, leaves them purposeless. According to the Eighth Circuit, there is no evidence that Congress wanted the provisions of the Civil Rights Act of 1991 to apply retroactively to cases pending in court on the date of its enactment. But why would Congress bother to exempt one pending case — the *Wards Cove* case — from the coverage of the statute unless it wanted the statute as a whole to apply to pending cases? Moreover, why would Congress bother to exempt a class of pending cases — those brought under Title VII by American employees working for American companies in foreign countries — from the coverage of the statute unless it wanted the statute as a whole to apply to pending cases? These statutory exemptions would be unnecessary if, as the Eighth Circuit suggests, the statute in general does not apply retroactively to pending cases. Taken seriously, the Eighth Circuit's interpretation renders Section 402(b) and Section 109(c) insignificant and inoperative, redundant and superfluous. They serve no independent function. Indeed, they amount to meaningless statutory graffiti. There is something profoundly wrong with any interpretation of a statute which assumes that Congress has done a completely useless and pointless thing. *Kungys v. U.S.*, 485 U.S. 759, 778-779 (1988). Plaintiff Hicks' interpretation, on the other hand, makes sense of the statute as a whole by giving effect to all of its provisions. His interpretation must be accepted because it ascribes a very clear purpose and function to Section 402(b) and Section 109(c): they serve as exceptions to the general rule of retroactivity set forth in Section 402(a). *See Davis v. City and County of San Francisco*, 976 F.2d 1536, 1549-1556 (9th Cir. 1992).

Significantly, this Court has held that Congress is presumed to legislate with knowledge of these basic rules of statutory interpretation. *McNary v. Haitian Refugee Center, Inc.*, 111 S.Ct.

889, 898 (1991). So it is a safe bet, given the way it wrote and structured the Civil Rights Act, that Congress wanted the statute to operate retroactively. The Eighth Circuit's conclusion to the contrary seriously misreads the intent of Congress and cannot be allowed to stand.[1]

The Eighth Circuit also seriously misinterpreted this Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). According to the Eighth Circuit, *Bowen* mandates that a court must presume, when the intent of Congress is unknown, that Congress intends a newly-enacted statute to apply prospectively. This is true, says the court, even when applying the statute retroactively would not be unfair to anyone. This interpretation of *Bowen* is clearly wrong.

Mindlessly applying a rule of law, without regard to its purpose, is intolerable. Yet that is precisely what the Eighth Circuit did in this case. The court invoked the legal presumption of prospectivity set forth in *Bowen* to support its conclusion that the Civil Rights Act does not apply retroactively to Mr. Hicks' case. But the court neglected to consider the *purpose* behind the *Bowen* rule of law. As Justice Scalia has explained, the legal presumption that Congress intends its legislation to operate

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[1]The Eighth Circuit concluded that Congress could not agree on whether the provisions of the Civil Rights Act should be retroactive or prospective, with the exceptions of Section 402(b) and Section 109(c), and therefore left it up to the courts to decide. The problem with this conclusion, however, is that it is based on speculation. Although the remarks of some members of Congress support the Eighth Circuit's conclusion, the remarks of other members of Congress clearly refute it. *See, e.g.*, 137 Cong. Rec. H9548 (Rep. Hyde); 137 Cong. Rec. S15966 (Sen. Durenberger); 137 Cong. Rec. H9530 (Rep. Edwards). The legislative history, in other words, is hopelessly contradictory. Under these circumstances, courts must stick to the *text* of the Civil Rights Act, and the reasonable inferences to be drawn from it, in analyzing Congressional intent. The legislative history of the Act can, and should, be ignored. *Green v. Bock Laundry Co.*, 109 S.Ct. 1981, 1994 (1989) (Scalia, J., concurring).

prospectively "gives effect to enduring notions of what is fair" and thus accords with probable legislative intent. *Kaiser v. Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1587 (1990) (Scalia, J., concurring). Absent unfairness, there is no reason to presume that Congress wants a newly-enacted statute to operate prospectively. On the contrary, there is every reason to presume the exact opposite: that Congress wants the statute to operate retroactively. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974). After all, the policy considerations which prompted Congress to enact the legislation will be furthered, rather than frustrated, if the legislation is given immediate effect in pending litigation. *U.S. v. Angiulo*, 755 F.2d 969, 971 (1st Cir. 1985). Because the Eighth Circuit failed to apply a fairness analysis, which is implicit in *Bowen*, its opinion must be set aside. *See Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 886, 900-915 (D.C. Cir. 1992) (Wald, J., dissenting).

Applying Section 101 of the Civil Rights Act to the present case will not be unfair to Defendant Brown Group. The fundamental reason for prospective application of a statute, as Justice Scalia has emphasized, is to ensure that "the legal effect of conduct [will] be assessed under the law that existed when the conduct took place." *Bonjorno, supra*, 110 S.Ct. at 1586. That is not a problem here. The key event giving rise to this litigation — Mr. Hicks' termination from employment — took place in 1982. At that time, the law in the Eighth Circuit, and everywhere else, was that a racially motivated discharge from employment violated Section 1981. Appendix at A12. It was not until 1989, seven years later, that the U.S. Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and dramatically narrowed the scope of Section 1981. Congress concluded, however, that *Patterson* wrongly construed Section 1981. Section 101 of the Civil Rights Act corrects the error and restores the law to where it was before *Patterson* was decided. The law now, as it was in 1982, is that a racially motivated discharge from employment violates Section 1981.

Under these circumstances, Defendant Brown Group cannot complain of any unfairness. There is nothing unfair about holding an employer accountable for acts of intentional discrimination which were unlawful when they were committed and which would likewise be unlawful if committed today. *U.S. v. Johns*, 742 F.Supp. 196, 217-218 (E.D. Pa. 1990). A retroactive statute is unfair only when it renders conduct unlawful which, when it was done, was lawful. *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1127 (D.C. Cir. 1985). That is not the situation here. Applying Section 101 of the Civil Rights Act to this case will mean that the parties will be governed by the law they all understood to exist at the time the challenged termination from employment took place. Nothing could be fairer.

2.

The Eighth Circuit's ruling in this case directly contradicts the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992). In *Davis*, the Ninth Circuit carefully analyzed the text and structure of the Civil Rights Act and concluded that Congress intended the Act to operate retroactively. *Id.* at 1549-1556. The Eighth Circuit, however, rejected the Ninth Circuit's analysis. Appendix at A3-A5. As a result, there exists a conflict among the Circuits over the interpretation of the Act which requires authoritative resolution by this Court.

This conflict among the Circuits is sufficient reason, by itself, to grant certiorari in this case. The Civil Rights Act of 1991 is a landmark statute. Whether it does, or does not, apply to the thousands of Section 1981 and other civil rights cases currently pending in the federal court system is a question of exceptional national importance. For this reason alone, Plaintiff Hicks' petition for certiorari should be granted. *Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965) (certiorari granted because of a conflict among the Circuits and the fact that "a

considerable number of suits are pending in the lower courts which will turn on resolution of these issues").[2]

3.

Finally, it is crucial to point out that this Court has recently granted certiorari in two cases which squarely raise the issue of the retroactivity of the Civil Rights Act of 1991: (1) *Landgraf v. U.S.I. Film Industries*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993) and (2) *Rivera v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3558 (February 22, 1993). Significantly, the *Rivera* case, like this case, is a Section 1981 case. Thus, it raises the same legal issue — the retroactivity of Section 101 of the Civil Rights Act — as the present case. The course of action the Court should follow under these circumstances is clear enough:

> Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.

See Stern, Gressman and Shapiro, *Supreme Court Practice*, §4.16 at p. 221 (Sixth ed. 1986). The Court should grant certiorari in this case or, alternatively, hold the case in abeyance

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[2]Although the majority of Circuits have held that the Civil Rights Act does not apply retroactively, they have often done so over vigorous and well-reasoned dissenting opinions. *See, e.g., Gersman v. Group Health Ass'n., Inc.*, 975 F.2d 886, 900-915 (D.C. Cir. 1992) (Wald, J., dissenting); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1379-1382 (8th Cir. 1992) (Heaney, J., dissenting); *Mozee v. American Marine Service Co.*, 963 F.2d 929, 940-941 (7th Cir. 1992) (Cudahy, J., dissenting).

pending an authoritative resolution of the retroactivity issue in the *Landgraf* and *Rivera* cases.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari, vacate the judgment of the Eighth Circuit, and remand the case with directions to enter judgment in favor of Plaintiff Hicks.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-2769 and 88-2817

Kenneth G. Hicks,
Plaintiff - Appellee,
v.
Brown Group, Inc., d/b/a/ Brown Shoe Company, Inc.,
Defendant - Appellant.

Appeals from the United States District Court
for the Eastern District of Missouri,

Submitted: July 21, 1992
Filed: December 30, 1992

Before RICHARD S. ARNOLD, Chief Judge, HEANEY, Senior Circuit Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges, En Banc.

LOKEN, Circuit Judge, with whom RICHARD S. ARNOLD, Chief Judge, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges, join.

Kenneth G. Hicks lost his job in 1982 when Brown Group, Inc. reduced the supervisory staff at its Benton, Missouri, terminal.

Hicks, a white male then 51 years old, sued and a jury found that he was terminated because of his race in willful violation of 42 U.S.C. § 1981. He was awarded $1.00 in actual damages, $10,000 in punitive damages, and his costs and attorneys' fees. Brown Group appealed and a panel of this court affirmed, one judge dissenting. See *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), which contains a thorough recitation of the background facts.

Brown Group then filed a petition for a writ of certiorari, and the Supreme Court remanded. 111 S. Ct. 1299 (1991). Following remand, the panel unanimously reversed the judgment of the district court, concluding that Hicks's discriminatory discharge claim is not actionable under § 1981 as construed in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and our en banc decision in *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991). *Hicks v. Brown Group, Inc.*, 946 F.2d 1344 (8th Cir.), *motion to vacate denied*, 952 F.2d 991 (8th Cir. 1991). Hicks then sought a writ of certiorari and the Supreme Court again remanded, this time "for further consideration in light of the Civil Rights Act of 1991." 112 S. Ct. 1255 (1992).

On remand, the panel submitted the case to the court en banc, recognizing that the Supreme Court's remand requires us to consider again the issue of statutory retroactivity decided by another panel in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992). We now uphold the decision in *Fray* that § 101(2)(b) of the Civil Rights Act of 1991 does not apply retroactively to cases pending at the time of its enactment. Accordingly, we reinstate the panel's October 9, 1991, decision.

Section 101(2)(b) of the 1991 Act legislatively overruled *Patterson*:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, *and termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

42 U.S.C. § 1981(b) (emphasis added). Thus, Hick's § 1981 claim fails under *Patterson* and *Taggart* but would succeed if this provision in the 1991 Act retroactively applies to his case.

This retroactivity question has already been the subject of substantial judicial exposition. In addition to our decision in *Fray*,[1] at least five other circuits have concluded that various provisions of the 1991 Act do not apply retroactively to cases pending at the time of enactment. *See, e.g., Gersman v. Group Health Assoc., Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Holt v. Michigan Dept. of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Luddington v. Indiana Bell Tel.Co.*, 966 F.2d 225 (7th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992). One circuit has reached a contrary conclusion. *See Davis v. City & County of San Francisco*, 976 F.2d 1536, 1549-56 (9th Cir. 1992). Given this wealth of learned judicial discourse, we see no need to redefine the background principles and precedents that shape this significant issue. Instead, we will briefly summarize the reasons that lead us to adhere to our decision in *Fray*.

1. The initial question is whether Congress in the 1991 Act evidenced its intent on this question of retroactivity. The Ninth Circuit concluded that "the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage." *Davis*, 976 F.2d at 1550. The court in *Davis* divined that intent from the two provisions in the Act that were expressly made prospective only, concluding from these provisions that the rest of the statute must be applied retroactively.

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[1]Like this case, *Fray* involved the question whether § 101(2)(b) of the 1991 Act is retroactive. We have applied the *Fray* analysis in holding that other provisions of the 1991 Act do not apply retroactively. *See Hughes v. Matthews*, No. 92-1620 (8th Cir. Dec. 8, 1992) (§ 102(c)); *Davis v. Tri-State Mack Distribs., Inc.*, No. 92-1123 (8th Cir. Dec. 8, 1992) (§ 113); *Parton v. GTE North, Inc.*, 971 F.2d 150, 155-56 (8th Cir. 1992) (§ 102); *Huey v. Sullivan*, 971 F.2d 1362, 1365 (8th Cir. 1992) (§ 114).

In *Fray*, we concluded that the presence of these provisions does not outweigh the overwhelming legislative evidence that a divided Congress intended "to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue." 960 F.2d at 1377. Every other circuit to consider the question has agreed. As the D. C. Circuit explained:

> However, given the convoluted legislative history of the Act and the war of interests firing at each other across the floor of both legislative houses, one might view these two subsections not as redundancies, but rather as insurance policies [for those who opposed retroactivity].

Gersman, 975 F.2d at 890. We agree that neither the language of the 1991 Act nor its legislative history reflects an identifiable congressional intent that the statute be generally retroactive.

2. With congressional intent indiscernible, we must apply the conflicting presumptions as to statutory retroactivity articulated in *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974), on the one hand, and *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), on the other. Under the *Bradley* test, we must apply the Act to pending cases unless it provides expressly to the contrary or manifest injustice would result from retroactive application. But under *Georgetown Hospital*, the Act is prospective unless it expressly provides for retroactive application. Thus, the issue seems to present a choice between two equally applicable but inconsistent lines of Supreme Court precedent.

Of course, when two Supreme court decisions seem inconsistent, they are seldom equally applicable. If *Bradley* is the more applicable — if it is a controlling precedent — we are not free to ignore it. However, we conclude that *Bradley* involved distinguishable circumstances. In *Bradley*, a statute allowing attorneys' fees in school desegregation cases was applied retroactively to a pending claim for attorneys' fees against a public

school district. This case, on the other hand, involves a dispute between private parties. Long before *Bradley*, the Supreme Court noted that, when a new statute may affect private disputes, courts should "struggle hard against a construction which will, by a retroactive operation, affect the rights of parties." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801), quoted in *Bradley*, 416 U.S. at 717.

Section 101 of the 1991 Act expands the range of conduct that will violate § 1981. In *Bennett v. New Jersey*, 470 U.S. 632, 639 (1985), the Supreme Court stated that the *Bradley* presumption of retroactivity should be limited by the "venerable rule of statutory interpretation . . . that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." In holding that the 1991 Act does not apply retroactively, many circuits have distinguished *Bradley* and followed the *Georgetown Hospital* presumption on this ground. *See Gersman*, 975 F.2d at 898-99; *Baynes*, 976 F.2d at 1374-75; *Johnson v. Uncle Ben's, Inc.*, 965 F.2d 1363, 1374 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3356 (No. 92-737, Sept. 29, 1992); *Mozee v. American Commercial Marine Serv. Co.*, 963 F.2d 929, 936 (7th Cir.), *cert. denied*, 113 S. Ct. 207 (1992); *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir.), *cert. denied*, 113 S. Ct. 86 (1992). We agree.[2]

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[2] While we do not agree with the Ninth Circuit's reasoning, we note that *Davis* retroactively applied the section of the 1991 Act that allows enhanced attorneys' fee awards to a pending claim against a public body, the San Francisco Fire Department. Thus, *Bradley* was arguably a controlling precedent in *Davis*. However, there is also a basis for distinguishing the statutes at issue in *Davis* and *Bradley*. As the Fifth Circuit has noted, in *Bradley* "the statutory change provided only an additional basis for relief already available," whereas "a dramatic change in the remedial consequences of a rule works change in the normative reach of the rule itself." *Landgraf v. USI Film Prods.*, 968 F.2d 427, 433 (5th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3371 (No. 92-757, Oct. 28, 1992).

3. Although we can readily distinguish the Civil Rights Act of 1991 from the statute at issue in *Bradley*, we also believe that the conflicting presumptions articulated in *Bradley* and *Georgetown Hospital* reflect truly divergent lines of authority on the question of statutory retroactivity. We recently reviewed these conflicting precedents in *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991), and concluded:

> [Where] Congress's silence is ambiguous . . . one must choose between the *Bradley* and *Georgetown Hospital* presumptions. The better rule is that of *Georgetown Hospital*.... [T]he presumption against retroactive application best preserves the distinction between courts and legislatures: the former usually act retrospectively, settling disputes between persons, the latter usually act prospectively, setting the general rules for future conduct.

See also Criger v. Becton, 902 F.2d 1348, 1353-54 (8th Cir. 1990).

Some have argued that the Civil Rights Act of 1991 should nonetheless be given retroactive effect because it is "restorative" legislation — by overruling recent Supreme Court decisions such as *Patterson*, the Act restored prior law and therefore did not interfere with justified expectations or vested rights. We agree with the Seventh Circuit's response to this contention:

> When [Congress] "overrules" a Supreme Court decision it is not registering disagreement with the merits of what the Court did; it is laying down a new rule of conduct — ordinarily for the future. Section 1981 dates back to 1866. It is as unlikely that Congress was attempting to restore section 1981 to the understanding of its framers as that *Patterson* in cutting back the earlier decisions had restored the statute to its original understanding. The new civil rights act reflects contemporary policy and politics, rather

> than a dispute between Congress and the Supreme Court over the mechanics of interpretation.

Luddington, 966 F.2d at 228.

In addition, we conclude that case-by-case application of *Bradley's* "manifest injustice" exception to the many provisions of the 1991 Act would be unworkable.[3] Focusing on § 101(2)(b) of the Act as an example, some pending § 1981 cases challenge conduct that occurred prior to *Patterson*, while others challenge conduct occurring while *Patterson* was the law. Some challenge conduct that also violates Title VII, while others challenge conduct by private employers who are exempt from Title VII's proscriptions. Absent explicit congressional directive, we think it unwise and improper to undertake the essentially legislative task of adopting "unwieldy distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating" the 1991 Act. *Johnson*, 965 F.2d at 1374. As the Seventh Circuit summarized this dilemma:

> Retroactive application across the board would produce massive dislocations in ongoing litigation and defeat substantial reliance interests of employers. Retroactive application carefully tailored to situations . . . in which those reliance interests are minimal would engender enormous satellite litigation and associated uncertainty to fix an indistinct boundary.

Luddington, 966 F.2d at 229.

These problems graphically demonstrate that it is Congress that should define, in the legislation, the extent to which a statute is to be retroactively applied. When Congress fails to do so, the

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[3] We also agree with Justice Scalia that this exception "is just a surrogate for policy preferences . . . a rule of discretion, giving judges power to expand or contract the effect of legislative action." *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 857 (1990) (concurring op.).

presumption that statutes operate prospectively should prevail. Therefore, in this circuit, to the extent that a retroactivity issue reduces to a choice between two equally applicable but inconsistent lines of Supreme Court precedent, we conclude that "the better rule is that of *Georgetown Hospital*."

For the foregoing reasons, and for the additional reasons stated in our prior decision in *Fray*, we conclude that § 101 of the 1991 Act may not be retroactively applied to this pending case. Accordingly, the judgment of the district court is reversed and the case is remanded to the district court with directions to dismiss Hicks's § 1981 complaint with prejudice.

HEANEY, Senior Circuit Judge, dissenting, with whom McMILLIAN, Circuit Judge, joins.

Two issues are raised on this appeal: (1) whether the racially discriminatory discharge of Kenneth Hicks in 1982 violates the provisions of 42 U.S.C. § 1981; and (2) if not, whether section 101 of the Civil Rights Act of 1991 applies to Hicks's action. I would answer both questions in the affirmative. Thus, I respectfully dissent.

I recognize that a divided en banc court resolved the first issue in the negative in *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991). Nonetheless, this issue is raised on appeal and could, and should, be decided differently by this court - if not by this court, then by the United States Supreme Court. I continue to believe that Judge McMillian's eloquent panel opinion in *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), is the better view of the law. Judge McMillian again expressed his views on this issue in a dissent to *Taggart*, in which he was joined by former Chief Judge Donald Lay and Chief Judge Richard S. Arnold. The dissent supports the proposition that *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), should not bar recovery for employees who have been discharged because of their race. Because the Su-

preme Court did not specifically address the issue of discriminatory discharge in *Patterson*, it is my hope that it will accept certiorari in this case and resolve the issue once and for all.

Assuming *Patterson* did temporarily bar discriminatory discharge claims under section 1981, I turn now to the question whether section 101 of the Civil Rights Act of 1991 restored Hicks's right to bring this action. I am convinced that it does. The majority holds that unless Congress specifically states that a statute is to be applied retrospectively, a presumption that statutes operate prospectively should prevail.[1] It reasons that *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), overrules *Bradley v. School Board*, 416 U.S. 697 (1974), and thus we must look to *Georgetown Hospital*,[2] to determine whether section 101 applies to Hicks's case.[3] It does so even

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[1] In *Davis v. County of San Francisco*, 976 F.2d 1536, 1550 (9th Cir. 1992), the court held that "reliance on a presumption is unnecessary, because the language of the Act reveals Congress' clear intention that the majority of the Act's provisions be applied to cases pending at the time of its passage."

[2] Although most commentators refer to *Bowen v. Georgetown University Hospital* as *Bowen*, the majority uses the short citation "*Georgetown Hospital*." In the interest of consistency, I will follow the practice of the majority.

[3] Even if we could, on our own authority, dismiss a precedent of the Supreme Court, I do not concur with the majority's election of *Georgetown Hospital* over *Bradley*. Other commentators agree:

> The *Bowen* [*Georgetown Hospital*] approach cannot be justified on constitutional or policy grounds. Although *Bowen's* clear-statement rule is cloaked in the guise of neutrality — making it appear as if the Court is taking a purely hands-off approach — the imposition of the rule is itself a policy choice to avoid resolving statutory dilemmas. Such a policy creates a conundrum in which Congress leaves the issue to the courts, and the courts give back to Congress a task which it cannot complete. The two branches pass the issue back and forth, without ever assessing its validity, impact or necessity. . . .
>
> . . . .

(Footnote 3 continued on next page)

though the Supreme Court has declined to overrule *Bradley*,[4] and in spite of a specific direction of the Supreme Court that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

I realize that Supreme Court Justice Antonin Scalia believes that *Georgetown Hospital* and *Bradley* are irreconcilable and that *Georgetown Hospital* should be adopted as the position of the Court, but Justice Scalia does not speak for the full Court on this issue. It is our responsibility to follow the full Court rather than a single Justice. I was under the impression that we had

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(Footnote 3 continued)

> Moreover, the *Bowen* presumption fails to involve courts in any examination of the effects of particular laws and instead applies a stringent and unyielding test. Statutes differ in purpose and effect, yet the clear-statement rule treats them all identically. In certain cases, the *Bowen* presumption may prevent unjust application of the laws. With some statutes, however, retroactivity "can . . . actually serve the cause of legality . . . . [I]t can serve to heal infringements of the principle that like cases should receive like treatment." For these statutes, the *Bowen* presumption uncritically sanctions harsh results. When a court applies the clear statement rule to an ambiguous statute *without justification*, it avoids its judicial responsibility to interpret statutes. By refusing to engage in substantial interpretation, the Court may undermine legislative enactments.

Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 Mich. L. Rev. 2035, 2048-50 (1992) (footnotes omitted).

[4] In *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990), Justice O'Connor, writing for a plurality of the court, referred only to the "apparent tension" between the two cases. Furthermore, four justices in *Kaiser Aluminum* stated that the tension between *Bradley* and *Georgetown Hospital* is "more apparent than real." *Id.* at 864 (White, J. dissenting).

recognized our responsibility to reconcile Supreme Court decisions in *National Wildlife Fed'n v. A.S.C.S.*, 955 F.2d 1199 (8th Cir. 1992). Apparently we are prepared to overrule a precedent that is only ten months old.

In my view, *Georgetown Hospital* and *Bradley* are reconcilable,[5] and lead to the view that courts should, in the words of Judge Patricia Wald,

> presume, absent clear statutory language or legislative history to the contrary, that courts should apply the law in effect at the time they render their decisions, unless Congress would not intend the retroactive application of the new law because that would work an unfairness by upsetting the expectations of the parties concerning the legal consequences of their past conduct.

Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 902 (D.C. Cir. 1992) (Wald, J., dissenting).

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[5] A recent Note from the *Michigan Law Review* suggests that such reconciliation is possible and desirable:

> Instead of providing a presumption, . . . a court must determine whether applying the statute at issue to a given case implicates any of the dangers of retroactivity: unsettling expectations, depriving parties of notice, or targeting vulnerable groups. If these concerns arise, a court should decline to apply a statute to pending cases. If these concerns fail to materialize, a court should apply the law to pending cases. . . .
>
> This proposal recognizes the legitimate dangers of retroactivity addressed by *Bowen*, while concurrently allowing the deliberate approach of *Bradley*. This method simply eliminates the irreconcilable conflict between *Bradley* and *Bowen* by allowing courts to reach the heart of the retroactivity debate. In other words, rather than engaging in a useless debate over which presumption to apply, courts focus on actual objections to retroactivity and whether these objections inhere in a particular statute. This inquiry will lead to well-reasoned and inherently more just opinions.

Estrin, *supra*, at 2069.

As I noted in *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992), a common thread runs through *Bradley* and *Georgetown Hospital*. *Id.* at 1381. Both express an overriding concern for fairness. Although the sentiment of fairness in *Georgetown Hospital* is less obvious than the explicit and detailed factors outlined in *Bradley*, it is no less fundamental. The *Bradley* fairness factors are: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley*, 416 U.S. at 717.

Before applying the *Bradley* standard, it is important to emphasize that Hicks had secured a judgment in district court *before* the Supreme Court decided *Patterson*. The district court judgment determined that the Brown Group had illegally discharged Hicks because of his race. Both on the date of discharge and on the date that the district court's judgment was entered, discharges because of race were unlawful.[6]

I turn now to the very specific *Bradley* criteria, the first of which is whether this is a mere private case between individuals, in which the rights of the parties are of paramount importance, or whether larger public concerns are involved. *See Bradley*, 416 U.S. at 718-19. This case transcends the parties. It involves a matter of great national concern: the elimination of discrimination in the workplace. This factor weighs heavily in favor of retroactivity, especially in a case that would establish precedent for application of the 1991 act to other cases in which an employee already has secured a district court judgment that he suffered a racially discriminatory discharge.

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[6]In our circuit and others, discriminatory discharge cases prior to *Patterson* were actionable under section 1981. *See, e.g., Estes v. Dick Smith Ford*, 856 F.2d 1097, 1100-01 (8th Cir. 1988); *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1268 (8th Cir. 1981); *Person v. J.S. Alberici Constr. Co.*, 640 F.2d 916, 918-19 (8th Cir. 1981). *See also Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 722 (2d Cir. 1990), and *Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886, 909-11 (D.C. Cir. 1992).

The next criterion of the *Bradley* fairness calculus is a consideration of the relevant rights of the parties, and whether retrospective application of a law would infringe or deprive a person of rights that had matured or become unconditional. *Bradley*, 416 U.S. at 720. In this case, the Brown Group had a right not to be penalized for conducting its business in accordance with the laws in effect when it took action to discharge Hicks. Hicks, similarly, had a right to recover from his employer for violations of the law as it existed on the date of that discharge. In this case, the retrospective application of section 101 neither infringes nor deprives the settled rights of either party because both parties would enjoy precisely the same rights as they did on the date of discharge and on the date of the district court judgment. On the contrary, the prospective-only application of the statute adopted by the majority infringes what were once Hicks' matured rights.

The final *Bradley* criterion concerns the nature of the impact of the change upon existing rights, *id.*, and whether retrospective application denies fulfillment of justified expectations, or fails to provide citizens with notice of the law so that they may efficiently plan their affairs.[7] In the instant case, only a retrospective application of section 101 would fulfill Hicks's justified expectation that he would not be discharged because of his race. The Brown Group would simply be held to the existing standard of conduct as of the date of Hicks's discharge.[8]

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[7] *See* Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 Cal. L. Rev. 369, 399 (1984).

[8] The majority cites *Bennett v. New Jersey*, 470 U.S. 632 (1985), for the proposition that the *Bradley* presumption of retroactivity should be limited by the "venerable rule of statutory interpretation . . . that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." *Id.* at 639. I think *Bennett* must be read more broadly. Justice O'Connor went to great lengths in that opinion to point out that if the statute there in question were applied retrospectively, the reasonable expectations of

(Footnote 8 continued on next page)

Thus, when all of the *Bradley* factors are considered, I believe a holding that section 101 should apply retrospectively to the facts in this case must inexorably follow.[9] Not only had the Brown Group had been on notice before 1982 that it could not discharge employees because of their race,[10] but as Judge Wald notes, "[w]hen the `new' law is nothing more than a reenactment of the law that governed the relevant conduct at the time it occurred, there is no `manifest injustice' in applying the new law to the past conduct, even where an intervening Supreme Court opinion redefined the substantive law." *Gersman*, 975 F.2d at 908.

I agree with my colleagues that Congress left it for the courts to decide the question of "retroactivity." They did so because proponents, although in the majority, did not have the votes to override a threatened presidential veto. It is clear from the legislative history of the 1991 Civil Rights Act and from the language of section 101 that Congress intended to overrule

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(Footnote 8 continued)

the parties would be thwarted. She considered the practical consequences that would arise with retrospective application. In the present case, it is the practical consequences of *prospective* application that will thwart reasonable expectations: the Brown Group will not be held responsible for an action that clearly was illegal at the time it was committed (and is illegal again under current law), and Hicks will be deprived of the benefits of a law that was clearly in existence at the time he was discharged.

[9] In *Bradley*, the court tempered its presumption of retroactivity with an exception for cases in which retroactivity would result in "manifest injustice." 416 U.S. at 711. It noted Justice Marshall's admonition in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) that courts must "struggle hard against a construction which will, by a retrospective operation, affect the rights of the parties." 416 U.S. at 717. Here, no manifest injustice results because the Brown Group will only be required to do that which it was required to do at the time of the discharge.

[10] *See, e.g.*, Estrin, *supra*, at 2074 ("Since Title VII was enacted, employers have been on continual notice that discriminatory practices are subject to lawsuits.").

Patterson.[11] Moreover, the original 1990 act contained a specific "super-retroactivity" provision that would have applied to all proceedings pending on or commenced after June 15, 1989, including cases in which a final judgment already had been entered before the effective date of the act. "The fact that the President vetoed this version (and that a two-thirds majority was unavailable to override) tells us nothing about the congressional intent concerning application of section 101 to cases pending on November 21, 1991." *Gersman* at 912 (Wald, J., dissenting). In his veto message to Congress, the President noted that he relied on the attorney general in vetoing the 1990 act for retroactivity reasons. Significantly, however, the attorney general's objection to the retroactivity provisions of the 1990 act was not that they applied the act to pending cases, but that they applied it to cases already decided.[12]

I recognize that this is an unsettled area of the law and that courts that have considered whether the act is retrospective have come down on both sides of the issue. Yet the majority's analysis of the act's legislative history strains the bounds of credible statutory interpretation. It is disingenuous to suggest that Congress clearly intended the act to operate only prospectively. It is equally disingenuous to suggest that, unless we rule in favor of

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[11] *See* H.R. 1, 102d Cong., 1st Sess. (1992) (stating that section 12, which is nearly identical to the language of section 101 of the Civil Rights Act of 1991, "shall apply to all proceedings pending on or commenced after June 15, 1989." [*Patterson* was decided on June 15, 1989.]); H.R. Rep. No. 40(II), 102d Cong., 1st Sess. (1991) ("H.R. 1 applies retroactively to certain provisions overturning Supreme Court cases.... The retroactive sections are: ... 12 (overturning *Patterson*)"; and Estrin, *supra*, at 2053-54 (summarizing the legislative history).

[12] The Attorney General's only objection to the retroactivity provisions of the 1990 act was that section 15 "unfairly applies to changes in the law made by S. 2104 to cases already decided." Memorandum from Dick Thornburgh, Attorney General, to George Bush, President of the United States 10 (Oct. 22, 1990).

the Brown Group, we are undertaking "the essentially legislative task of adopting `unwieldy distinctions between classes of litigants based on the degree to which they relied on the legal regime antedating' the 1991 Act." *Supra*, slip op., at 7. Regardless of how we rule today, we are filling a gap in the 1991 act on which Congress could not agree, and fully intended we fill. The only question is whether we come down on the side of the reasonable expectations of both of the parties at the time of the disputed conduct, or on the side of a party that is seeking to avoid its responsibility to make racially neutral discharge decisions. I believe the majority comes down on the wrong side, and therefore dissent.

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No. 92-1538

In The

Supreme Court of the United States

October Term, 1992

KENNETH HICKS,

Petitioner,

vs.

BROWN GROUP, INC. d/b/a BROWN SHOE COMPANY, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.1 LIST

Brown Group, Inc., d/b/a Brown Shoe Company, Inc., has no parent. Brown Group, Inc. holds no controlling interest in any companies which are not wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
Rule 29.1 List	i
Table of Contents	ii
Table of Citations	iii
Statement of the Case	1
Summary of Argument	4
Reasons for Denying the Writ	6
I. Review by this Court is not warranted on the issue of whether claims of racially motivated discharges are actionable under 42 U.S.C. § 1981 after *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), in that this issue has been resolved.	6
II. Review by this Court to resolve the issue of whether the Civil Rights Act of 1991 applies retroactively to pending cases is not warranted.	9
A. Petitioner's Belief That The Eighth Circuit's Ruling Below Is In Error Is Insufficient To Merit Review By This Court.	9
B. Petitioner Fails To Comply With Supreme Court Rule 10.1	13

Contents

Page

C. This Court's Recent Grant Of Certiorari Of Two Cases Concerning The Issue Of The Retroactivity Of The Civil Rights Act Of 1991 Does Not Compel This Court To Grant Certiorari Herein. 14

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Baynes v. AT&T Technologies, Inc., 976 F.2d 1370 (11th Cir. 1992) 9

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 3, 5, 10, 12

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 10

Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577 (1982) 11

Brown Group, Inc. v. Hicks, 111 S. Ct. 1299 (1991) 2, 3

Consumer Product Safety Commission v. G.T.E. Sylvania Corp., 477 U.S. 102 (1980) 11

Davis v. City and County of San Francisco, 976 F.2d 1536 (9th Cir. 1992) 5, 13

Contents

Page

Davis v. City and County of San Francisco, 984 F.2d 345 (9th Cir. 1993) 5, 13, 14

Estate of Reynolds v. Martin, 985 F.2d 470 (9th Cir. 1993) 14

Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992) 10

Gersman v. Group Health Ass'n, Inc., 975 F.2d 886 (D. C. Cir. 1992) 9, 10, 11

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990) 2, 10

Holt v. Michigan Dep't of Corrections, 974 F.2d 771 (6th Cir. 1992) 9

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 8, 12

Landgraf v. U.S.I. Film Industries, 968 F.2d 427 (5th Cir. 1992) 5, 14

Luddington v. Indiana Bell Tele. Co., 966 F.2d 225 (7th Cir. 1992) 9

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 2, 4, 6, 8, 12

Rivera v. Roadway Express, 973 F.2d 490 (6th Cir. 1992) 5, 14, 15

Contents

	Page
Rowe v. Sullivan, 967 F.2d 186 (5th Cir. 1992)	9
Simmons v. Lockhart, 931 F.2d 1226 (8th Cir. 1991)	10
Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990)	2
United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)	10
United States v. Security Industrial Bank, 459 U.S. 70 (1982)	12
Statutes Cited:	
28 U.S.C. § 1254	6
42 U.S.C. § 1981	passim
Rules Cited:	
Federal Rule of Civil Procedure 41	3
Supreme Court Rule 10	4, 5, 6, 14
Supreme Court Rule 10.1	9, 13
Supreme Court Rule 10.1(a)	13
Supreme Court Rule 14.1(g)	1

Contents

Page

Other Authorities Cited:

Harlan, J., Manning the Dikes, 13 Record of N.Y.C. Bar Ass'n 541 (1958) 8, 9

Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 (1953) 7

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 14.1(g), Petitioner is required to provide "[a] statement of the case containing the facts material to the consideration of the questions presented." (emphasis omitted). Inasmuch as Petitioner failed to provide this Court with a statement including *all* material and procedural facts

relevant herein, Respondent is compelled to provide a brief statement of the case.

In 1982, Kenneth Hicks was terminated from his employment by Brown Group, Inc., d/b/a Brown Shoe Company, Inc., Respondent herein. Hicks brought suit under the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, alleging his termination was improperly motivated by his race, white. In 1988, judgment was entered against Respondent based upon the jury's verdict. While the jury awarded Hicks zero in actual damages, it nonetheless awarded Hicks Ten Thousand Dollars ($10,000) in punitive damages. In response, the court modified the jury verdict by increasing the verdict through a grant of additur, awarding one dollar ($1) in nominal damages.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), despite this Court's earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which clearly held Section 1981 does not provide a cause of action for, *inter alia*, alleged discriminatory discharges. In response, Respondent herein properly and timely filed a Petition for Rehearing *en banc*, which was denied. Accordingly, Respondent filed a Petition for Writ of Certiorari with this Court.

In the interim, a different panel of the Eighth Circuit Court of Appeals criticized *Hicks*, but, albeit reluctantly, followed precedent. *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990). Thereafter, the Eighth Circuit granted rehearing *en banc* in *Taggart*, which prompted this Court to vacate the judgment in *Hicks* and remand the cause. *See Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991). After the *en banc* decision in *Taggart* issued, 935 F.2d 947 (8th Cir. 1991), holding discriminatory discharge claims not actionable under Section 1981, an Eighth Circuit panel reversed the judgment in favor of

Hicks and issued a mandate directing the district court to dismiss the Complaint with prejudice. No petition for rehearing was filed. On October 22, 1991, Hicks filed a motion to stay the mandate. By order dated October 28, 1991, however, United States Magistrate David D. Noce dismissed the cause with prejudice. At that point, this cause had been adjudicated under the laws that existed prior to enactment of the Civil Rights Act of 1991.

Thereafter, Judge Noce's previous dismissal was vacated because of a stay issued by the Eighth Circuit. Subsequently, on November 21, 1991, the Civil Rights Act of 1991 was enacted, which provided, in part, that discriminatory discharges are actionable under Section 1981. Based upon this legislative action occurring well after, for practical purposes, disposition of this cause, Hicks filed a Petition for Writ of Certiorari with this Court, after the Eighth Circuit denied Hicks' motion to vacate its October 9, 1991 Order, as well as a motion to extend the stay of the mandate.

This Court, in response, granted the Petition and remanded the case "for further consideration in light of the Civil Rights Act of 1991." 112 S. Ct. 1255 (1992). On remand, the Eighth Circuit, sitting *en banc*, concluded that Section 101 of the 1991 Act does not apply retroactively to the instant case. In support thereof, the Court found the Act ambiguous with respect to legislative intent and, because of the absence of language expressly mandating retroactivity, the Court applied the presumption of prospectivity in accordance with this Court's precedent of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). Accordingly, on December 30, 1992, the Court ordered the cause remanded to the district court with direction to dismiss Hicks' Complaint with prejudice. On February 4, 1993, the mandate arrived in the district court but no mandate has issued in accordance with Rule 41, Federal Rules of Civil Procedure, despite Hicks' inaction in seeking a stay. Nevertheless, Hicks filed another Petition for Writ of Certiorari, to which Respondent herein opposes.

SUMMARY OF ARGUMENT

Petitioner herein urges this Court to grant his Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals to determine: (1) whether claims of racially motivated discharges are actionable under 42 U.S.C. § 1981 in light of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and (2) whether the Civil Rights Act of 1991 applies retroactively to pending cases. In response, Respondent herein respectfully requests this Court, in its discretion, deny the instant Petition.

With respect to the issue of whether discriminatory discharge claims are actionable under Section 1981, Petitioner has failed to allege or prove the existence of special and important reasons warranting review and, thus, in accordance with Supreme Court Rule 10, certiorari should be denied. First, this particular issue lacks appropriate significance inasmuch as Section 101 of the Civil Rights Act has resolved fully this issue. Further, there has been no showing of an existence of any dispute or confusion concerning the meaning and import of Section 101, which clearly amends and expands Section 1981 to include "termination" of contracts within the meaning of "make and enforce contracts." Moreover, this Court has previously ruled implicitly upon this precise issue in this cause by *vacating* the Eighth Circuit's affirmance that discriminatory discharges were actionable under Section 1981, even in light of *Patterson*. Thus, because this issue has been resolved by the enactment of Section 101, as well as by this Court in the law of the case, review of this issue is not warranted herein, and the instant Petition should be denied.

Second, with respect to the issue of the retroactivity of the Civil Rights Act of 1991, review by this Court herein also is not warranted. At the outset, Petitioner's assertion that the ruling below is in error is wholly insufficient to merit review by this Court. Moreover, contrary to Petitioner's assertion, the Eighth

Circuit's holding below was, in fact, decided correctly on its merits. Because the 1991 Act is *silent* as to retroactivity, in accordance with this Court's ruling in *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988), the 1991 Act *must* operate prospectively only. Indeed, the Eighth Circuit has been joined by the D.C., Fifth, Sixth, Seventh and Eleventh Circuits in its view of the prospective application of the 1991 Act.

Further, Petitioner fails to comply with Supreme Court Rule 10 in that he fails to allege a conflict necessitating review by this Court. The Ninth Circuit decision relied upon by Petitioner as establishing a conflict within the meaning of Supreme Court Rule 10, *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992), was subsequently vacated. *Davis v. City and County of San Francisco*, 984 F.2d 345 (9th Cir. 1993).

Last, Petitioner's reliance upon this Court's grant of certiorari in two (2) different cases, *Landgraf v. U.S.I. Film Industries*, 968 F.2d 427 (5th Cir. 1992), and *Rivera v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), in support of his petition herein is misplaced and, once again, fails to establish any circumstance warranting review of the instant cause by this Court. As set out in more detail below, this particular cause, due to its unique factual and procedural posture, will not resolve fully the issue in general. Instead, attempted resolution of the issue through the instant cause would generate further argument and confusion as advocates, as well as the judiciary, begin to distinguish the peculiar facts and posture of this case. Therefore, this case is an inappropriate vehicle upon which to base a grant of certiorari. Indeed, the fact this Court has already granted certiorari to review two (2) cases which "squarely" raise the issue of retroactivity further compels denial of the instant Petition.

REASONS FOR DENYING THE WRIT

I.

REVIEW BY THIS COURT IS NOT WARRANTED ON THE ISSUE OF WHETHER CLAIMS OF RACIALLY MOTIVATED DISCHARGES ARE ACTIONABLE UNDER 42 U.S.C. § 1981 AFTER *PATTERSON V. McLEAN CREDIT UNION*, 491 U.S. 164 (1989), IN THAT THIS ISSUE HAS BEEN RESOLVED.

While Petitioner invokes the jurisdiction of this Court based upon 28 U.S.C. § 1254, which contains no subject matter jurisdiction, "review on writ of certiorari is not a matter of right, but of judicial discretion" and will be granted only "when there are special and important reasons therefor." S. Ct. R. 10. Petitioner urges this Court to grant certiorari in this case to resolve "once and for all" the issue of whether claims of racially motivated discharge are actionable in light of *Patterson.*

Respondent submits this issue has been resolved by the passage of the Civil Rights Act of 1991 and thus, there are no "special and important reasons" for granting certiorari on this basis. Section 101 of the Civil Rights Act of 1991 amends 42 U.S.C. § 1981 by adding the following subsection:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(Emphasis added). Since its enactment, there has been no dispute as to the meaning of this language — discriminatory discharges are actionable under 42 U.S.C. § 1981.

Because the issue of whether discriminatory discharges are actionable under Section 1981 has been resolved, there are no "special and important" reasons for a grant of certiorari in this respect. Indeed, a primary rationale for granting certiorari is to achieve a uniform application of law. Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 470 (1953). There has been no showing that the federal courts have issued conflicting opinions in this regard, nor is there any showing of any dispute concerning the meaning and import of Section 101 of the Civil Rights Act of 1991.

Petitioner nevertheless urges this Court to grant certiorari and "hold that claims of racially motivated discharge from employment violate Section 1981." Petition for Writ of Certiorari, at p. 6. At first glance, it is perplexing why Petitioner even presents this question for review, particularly in light of Section 101 of the Civil Rights Act. Yet, Petitioner's purpose and intent is clear — if this Court would grant certiorari on the issue of the retroactivity of the Civil Rights Act of 1991 and agree with the convincing majority that the 1991 Act is *not* retroactive, the only way Petitioner can prevail on his underlying claim is for this Court to hold discriminatory discharges actionable in light of *Patterson*, regardless of Section 101. Yet, the law of this case evidences that this Court has previously ruled implicitly on this very issue. Prior to the first writ of certiorari being sought of this Court, an Eighth Circuit panel affirmed the lower court's ruling that discriminatory discharges were actionable under Section 1981, despite *Patterson*. Yet, this Court granted certiorari and *vacated* this judgment. Thus, this Court has implicitly ruled, in the law of the case, that discriminatory discharges had never, whether before or after

Patterson, been actionable under Section 1981.[1]

Because this issue has been resolved "once and for all" by the enactment of Section 101, and because this Court has previously ruled implicitly on this issue herein, certiorari should not be granted on this question presented. Petitioner is obviously displeased with the timing of accrual of his cause of action (*e.g.*, before the enactment of the Civil Rights Act) and believes this case has been wrongly decided. However, as noted by Justice Harlan, "[t]he fact that a case may have been wrongly decided as between the parties is not, standing alone, enough to assure certiorari." Harlan, J., *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 n.6 (1958). Petitioner has been successful thus far, through an abuse of the procedural, judicial processes, in continuing his attempt to resuscitate this cause of action in the hopes of a favorable change in the law. It is time for this cause finally to be put to rest. There simply exist no special or important reasons for a grant of certiorari on the *Patterson* issue, and Petitioner's personal dissatisfaction with the status of the law is not enough.

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1. As this Court is well aware, when the Supreme Court, as opposed to the legislature, acts, it acts *retroactively*. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 847 (1990) (Scalia, J., concurring). Thus, when *Patterson* was decided, this Court made clear that Section 1981 was *and had been* severely restricted in scope and application, and, to the extent courts of appeals had, before *Patterson*, ruled to the contrary, such rulings had incorrectly interpreted the law.

II.

REVIEW BY THIS COURT TO RESOLVE THE ISSUE OF WHETHER THE CIVIL RIGHTS ACT OF 1991 APPLIES RETROACTIVELY TO PENDING CASES IS NOT WARRANTED.

Petitioner seeks, once again, to apply the 1991 Act to this cause of action which arose nearly ten (10) years ago and was, in effect, fully adjudicated *before* passage of the 1991 Act. In support thereof, Petitioner advances three (3) propositions which he believes compel a grant of certiorari on the issue of retroactivity of the Civil Rights Act of 1991. All three (3) of Petitioner's propositions fail to warrant review by this Court.

A. Petitioner's Belief That The Eighth Circuit's Ruling Below Is In Error Is Insufficient To Merit Review By This Court.

As noted earlier, that Petitioner believes this matter has been wrongly decided as between the parties does not justify a grant of certiorari. Harlan, J., *supra* p. 8, at 551 n.6. Further, despite Petitioner's apparent beliefs to the contrary, there can be no argument that the Eighth Circuit's ruling in this cause departs so far from "the accepted and usual course of judicial proceedings" that review by this Court is warranted. S. Ct. R. 10.1. Indeed, the decision of the Eighth Circuit is in accord with decisions of the following Circuits: D.C., Fifth, Sixth, Seventh and Eleventh. *E.g., Gersman v. Group Health Ass'n, Inc.*, 975 F.2d 886 (D.C. Cir. 1992); *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Holt v. Michigan Dep't of Corrections*, 974 F.2d 771 (6th Cir. 1992); *Luddington v. Indiana Bell Tele. Co.*, 966 F.2d 225 (7th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992).

Moreover, even if Petitioner's arguments in support of the

alleged error in the Eighth Circuit ruling are addressed, it is evident that the decision below was, in fact, decided correctly on the merits. Congressional intent with respect to retroactivity is indiscernible. *Hicks*, 982 F.2d at 297. The language of Section 402(a) is *silent* as to retroactivity. Moreover, the intense debate and concessions which were exchanged in order to effectuate passage of the Act evidences that Congress "intended to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue." *Id.* (citing *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1377 (8th Cir. 1992)); *see also Gersman*, 975 F.2d at 890. Because the intent of Congress is unclear, the Eighth Circuit applied this Court's decision in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), which mandates that a newly-enacted law is prospective *unless* it provides *expressly* for retroactive application.[2] "The presumption against retroactive application best preserves the distinction between courts and legislatures: the former usually act retrospectively, settling disputes between persons, the latter usually act prospectively, setting the general rules for future conduct." *Simmons v. Lockhart*, 931 F.2d 1226, 1230 (8th Cir. 1991).

Despite the logical, clear application of United States Supreme Court precedent by the Eighth Circuit in concluding the Civil Rights Act of 1991 is clearly prospective in nature, Petitioner nevertheless asserts error. Yet, Petitioner's contentions in support

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2. The Eighth Circuit, in adopting *Bowen*, properly distinguished *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974), which holds that a newly-enacted law must be applied to pending cases unless it provides expressly to the contrary or manifest injustice would result. *Bradley* did not involve *private* parties, as herein, but instead involved a pending claim for attorneys' fees against a public school district. Indeed, as noted by the Court in *Bradley*, courts "should struggle hard against a construction which will, by a retrospective operation, affect *the rights of parties*," *Bradley*, 416 U.S. at 717 (quoting *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801)) (emphasis added).

of this alleged "error" are unpersuasive and unconvincing. First, Petitioner cites two (2) canons of statutory construction which, he asserts, compel the conclusion that the 1991 Act was *intended* by Congress to operate retroactively. First, Petitioner recites a "general presumption" that because Congress specifically denied retroactive application of Sections 402(a) and 109(c) of the Act, it is presumed that Congress intended the remainder of the Act to be non-retroactive. Petition for Writ of Certiorari, at p. 7. However, it is also a "familiar canon of statutory construction," *Consumer Product Safety Commission v. G.T.E. Sylvania Corp.*, 447 U.S. 102, 108 (1980), that the plain language of a statute must control in the absence of "clear evidence" of a "clearly expressed" congressional intent to the contrary. *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982). Indeed, Petitioner concedes the ambiguity of the language, and hence, the lack of a "clearly expressed" intent, by citing canons of statutory interpretation to determine congressional intent. The plain language of Section 402(a) is silent as to its retrospectivity. Accordingly, no intent of Congress for the Act to apply retroactively can be gleaned, as posited by Petitioner, from Section 402(a).

Secondly, Petitioner asserts that congressional intent of retroactivity can be inferred from the fact that to hold otherwise would result in Sections 402(b) and 109(c) being rendered redundant or superfluous. Petition for Writ of Certiorari, at p. 8. Thus, in Petitioner's view, the only purpose behind the sections is to "serve as exceptions to the general rule of retroactivity set forth in Section 402(a)." *Id.* Yet, it is clear from the legislative history of the Act, including the heated debate surrounding passage of the Act, that the purposes of Sections 402(b) and 109(c) are *not* to serve as exceptions to a "general rule of retroactivity," but, instead, to serve as "insurance policies" to *ensure* prospectivity for those legislators who vehemently opposed retroactivity. *E.g., Gersman*, 975 F.2d at 890. While it may be argued that the sections should

serve *some* purpose, said purpose need not be *Petitioner's* purpose.[3]

Last, Petitioner mischaracterizes and misinterprets the meaning and proper application of *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). *Bowen* dictates that absent clear congressional intent mandating retroactivity, newly-enacted statutes are to be applied prospectively only. The purpose behind this reasoning is evident: conduct should be assessed under the law that existed when the conduct occurs. *Bonjorno*, 494 U.S. at 855. This reasoning, Petitioner errantly asserts, compels the conclusion that the purpose behind *Bowen* is not served in the instant case because Petitioner, discharged in 1982, was discharged when "the law in the Eighth Circuit, and everywhere else, was that racially motivated discharge from employment violated Section 1981." Petition for Writ of Certiorari, at p. 10. This argument is wholly devoid of merit, and evidences Petitioner's inability to discern the fundamental and elementary distinction regarding the impact and effects of acts of the legislature as opposed to the judiciary. As noted by Justice Scalia, every law school student is cognizant of this distinction; that is, when the legislature acts, it acts *prospectively*. Conversely, when the judiciary acts, it interprets, and thus, acts *retroactively*. *Bonjorno*, 494 U.S. at 847 (Scalia, J., concurring) (citing *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982)). Accordingly, when this Court issued its ruling in *Patterson*, it stated what the status of the law of Section 1981 was *and always had been*, regardless of the errant holdings of lower courts to the

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3. Petitioner asserts that the "problem" with the Eighth Circuit's opinion is that it is based upon "speculation." Petition for Writ of Certiorari, at p. 9 n.1. Yet, Petitioner's citations to canons of statutory construction to glean congressional intent are also based upon "speculation." Apparently, it is proper for Petitioner to rely upon speculation to prove retroactivity, but it is wholly improper of the Eighth Circuit to do the same to prove prospectivity.

contrary. Thus, contrary to Petitioner's assertion, application of the Civil Rights Act to this case would *not* result in the parties being governed by the law as it existed in 1982. Instead, Respondent would be held accountable for conduct which was not in violation of Section 1981, as evidenced by the *retrospective* operation of *Patterson. See id.* Thus, at the time of the termination of Petitioner's employment, the law of Section 1981, *properly applied*, provided *no* cause of action for Petitioner. In summary, Petitioner relies upon the Eighth Circuit's *incorrect* interpretation of the law of Section 1981 to assert herein that fairness compels application of the Civil Rights Act of 1991 to the instant cause.[4] As noted above, however, Petitioner's contention ignores the fundamental distinction between actions of the judiciary and the legislature and, thus, lacks merit.

B. Petitioner Fails To Comply With Supreme Court Rule 10.1.

Petitioner asserts the decision of the Eighth Circuit below conflicts with the Ninth Circuit's ruling in *Davis v. City and County of San Francisco*, 976 F.2d 1536 (9th Cir. 1992),[5] and, thus, this conflict "requires authoritative resolution by this court." Petition for Writ of Certiorari, at p. 11. Apparently, Petitioner is attempting to invoke Supreme Court Rule 10.1(a), which indicates that one of the reasons this Court will consider in granting certiorari is where Petitioner has demonstrated the existence of a conflict between

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4. Throughout Petitioner's writ, references to "fairness" abound. Yet, it is Respondent's position that interests of fairness, which Petitioner so vehemently professes and urges, compel denial of certiorari in this cause — this cause was, in essence, fully disposed of on not one, but two, separate occasions, and has spanned almost a decade. Fairness dictates this case, resuscitated only by judicial and procedural abuses, be permitted to end.

5. This panel decision cited by Petitioner in support of a conflict held the expert witness fees portion of the Civil Rights Act of 1991 retroactive. *Davis*, 976 F.2d at 1549-56.

two (2) courts of appeals. However, the panel decision cited by Petitioner in support of an alleged "conflict" with the decision below is, in fact, *not* in conflict with the decision below. That portion of the Ninth Circuit decision concerning the retroactive application of the Civil Rights Act of 1991 *was subsequently vacated* by the same panel. *Davis v. City and County of San Francisco*, 984 F.2d 345 (9th Cir. 1993). Thus, contrary to Petitioner's assertion, the Ninth Circuit panel decision in *Davis* does *not* conflict with the decision below and, therefore, Petitioner fails to comply with Supreme Court Rule 10 in that he fails to allege a conflict necessitating review by this Court.[6]

C. This Court's Recent Grant Of Certiorari Of Two Cases Concerning The Issue Of The Retroactivity Of The Civil Rights Act Of 1991 Does Not Compel This Court To Grant Certiorari Herein.

Petitioner relies upon this Court's most recent grant of certiorari in two (2) cases, *Landgraf v. U.S.I. Film Industries*, 968 F.2d 427 (5th Cir. 1992), and *Rivera v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), in support of his contention that this Court should grant certiorari herein. Petitioner asserts that because these cases "squarely raise" the issue of retroactivity of the 1991 Act,

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6. While Respondent submits Petitioner has failed to comply with Supreme Court Rule 10, thereby warranting denial of the instant Petition, it recognizes its obligation to disclose to this Court a subsequent Ninth Circuit panel decision which held the Civil Rights Act of 1991 applicable to a cause pending at the time the 1991 Act was enacted. *Estate of Reynolds v. Martin*, 985 F.2d 470 (9th Cir. 1993). However, as noted by Petitioner, this Court has already granted certiorari on two (2) cases "squarely addressing" the issue of retroactivity. Thus, inasmuch as this issue is to be resolved by this Court, Respondent urges denial of certiorari herein. Stern, *supra* p. 7, at 470 ("[A] conflict will not necessarily result in the granting of certiorari if the issue is no longer a live one.") Moreover, this cause is nevertheless an inappropriate vehicle upon which to grant certiorari to resolve the issue of retroactivity. *See infra* Section II.C.

this shows that the issue of retroactivity is of such legal importance that review by this Court is warranted. Petition for Writ of Certiorari, at p. 6. To the contrary, this development warrants *denial* of certiorari in the instant case. As discussed in previous briefings before this Court, as well as evidenced by the Statement of the Facts recited herein, the procedural posture of this case, as well as its unique factual situation, renders this case an inappropriate vehicle upon which this Court should decide the issue of retroactivity. As set out earlier, this case twice has had mandates issue to dismiss this cause with prejudice, and twice it has been resuscitated by procedural manuevering and abuses. The general issue sought to be addressed is simply whether the Civil Rights Act of 1991 is to be applied to cases pending at the time of its enactment. This case, due to its unique factual and procedural posture, will not provide a clear ruling on this issue, but will instead generate more argument and confusion as advocates, as well as the judiciary, begin distinguishing the particular facts and posture of this case. If, in fact, as Petitioner asserts, the two (2) cases currently pending before this Court "squarely raise" the issue of retroactivity, particularly as it applies to Section 1981 in *Rivera*, this Court, in its discretion, should deny certiorari in this case and render its ruling upon *proper* vehicles for such grant.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals in its entirety.

Respectfully submitted,

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